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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

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# No. 428

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JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

*vs.*

THE UNITED STATES OF AMERICA.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

---

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(34,559)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

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# No. 428

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JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA.

---

## PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners, James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, deceased, respectfully pray for a writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above entitled cause on July 6, 1929.

## A.

## Summary Statement of the Matter Involved.

### 1. *Questions Presented.*

The questions presented are whether section 202 of the Revenue Act of 1916 requires that there be included as a part of decedent's estate, for federal estate tax purposes, the value of property which at the time of the decedent's death was held by him and his wife (surviving him) as tenants by the entireties, and, if so, whether Congress had the power to require the inclusion of the value of such property in the amount of the decedent's gross estate.

### 2. *The Facts.*

The facts are not in dispute and the case was submitted to the District Court upon an agreed statement of facts (R. 25). So far as material to the issue involved, the facts are as follows:

James E. Tyler, a resident of the State of Maryland, died in said State on May 7th, 1918, intestate, and the appellants were duly appointed administrators of his estate and are now acting as such. At his death, the decedent and his wife were the owners of three hundred and fifty shares of the common stock of the Kimball-Tyler Company, a West Virginia corporation doing business in Maryland, the stock standing on the books of the corporation in the names of "James E. Tyler

and Ida H. Tyler, as tenants by the entireties," having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock, which at his death was valued at $59,193.42, and said sum was included by the Commissioner of Internal Revenue as a part of his gross estate in computing the estate tax liability under the Revenue Act of 1916, thereby increasing said tax in the amount of $3,337.67. A claim for refund was seasonably filed and, upon its rejection, the administrators of the estate entered suit for recovery of this amount of the tax in the United States District Court for the District of Maryland (R. 1).

The United States filed two pleas in the District Court (R. 7) and upon issues joined (R. 8), trial was before the Court without a jury and verdict and judgment for the amount claimed were rendered for the taxpayer (R. 22-3). The Court rendered an opinion in the case in which it was held that Section 202 (*c*) of the Revenue Act includes estates by the entireties, but since the effect of said Section 202 (*c*) of the act is to levy a direct tax upon decedent's estate contrary to Article I, Secs. 2 and 9 of the Constitution, said section 202 (*c*) of the Revenue Act of 1916 is invalid insofar as it affects a tenancy by the entireties; and that the tax in this case, insofar as it includes tenancies by the entireties, measures the tax upon decedent's estate by the property which belongs to another, namely the surviving spouse, and for this reason is arbitrary and capricious and in violation of the due

process clause of the Fifth Amendment to the Constitution (R. 8-22). The Circuit Court of Appeals reversed the judgment (R. 41) and rendered an opinion in which it was held that Congress intended to tax tenancies by the entireties and such a tax was not in violation of the Constitution or the Fifth Amendment thereof (R. 34). This judgment was entered July 6th, 1929. The said opinion of the judges of the Circuit Court of Appeals has not yet been reported. The decision of the United States District Court is reported in Fed. (2d) page 887.

**Reasons for the Allowance of the Writ.**

1. Because the case involves an important question of Federal tax which has not been, but should be, settled by this court.

2. Because the provision of the Revenue Act of 1916, the unconstitutionality of which is involved in this case, is continued in corresponding sections of all subsequent Revenue Acts.

3. Because the decision of the Circuit Court of Appeals in this case is in conflict with a rule of property which is the settled law of the State of Maryland, of which the decedent was a citizen at the time of his death, and where the property which was the subject of the tax was located.

4. Because the decision of the Circuit Court of Appeals in this case is inconsistent with the decision by this Court in the case of Reinecke *vs.* Northern Trust Co. (278 U. S. 339) and is bottomed upon an erroneous

interpretation of this Court's holding in the case of Chase National Bank *vs.* United States (278 U. S. 327), which interpretation by the Circuit Court of Appeals is not warranted by the decision and is irreconcilable and utterly inconsistent with this Court's holding in the said case of Reinecke *vs.* Northern Trust Co.

WHEREFORE your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2840, The United States of America, Appellant, versus James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, Deceased, Appellee, and that the said judgment of the Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JAMES E. TYLER, JR., AND
WILLIAM G. TYLER,
*Administrators of the Estate of*
*James E. Tyler, Deceased,*

By FRANK S. BRIGHT,
*Counsel for Petitioners.*

SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1929.**

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# No. 428

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JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

*vs.*

THE UNITED STATES OF AMERICA.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

### I.

### The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, entered July 6, 1929 (R. 34), has not been officially reported.

## II.

### Jurisdiction.

The petitioner seeks a review under the provisions of the Act of February 13, 1925, Chapter 229, Section 1; 43 Stats. 938; U. S. C. Title 28, Section 347. The application for, and the allowance of, the writ is sanctioned by the holdings of this Court in many cases involving the construction and interpretation of the United States Revenue Laws. The most recent of these cases is: Reinecke *vs.* Northern Trust Company, 278 U. S. 339.

## III.

### Statement of the Case.

A full statement of the case has been set out under the heading "A," in the petition, and in the interest of brevity is not repeated at this point.

## IV.

### Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that that imposition of an estate tax upon the estate of a decedent which included the value of the interest held jointly by himself and spouse (who survived him) as tenants by the entireties did not amount to the imposition of a direct tax in violation of Article I, Section 2, and Article I, Section 9, of the Constitution of the United States.

2. The Circuit Court of Appeals erred in finding and holding that said tax did not amount to confiscation of property in violation of the due process clause of the Fifth Amendment of the Constitution, inasmuch as the said tax is measured by the value of the interest of the surviving tenant as well as that of the deceased tenant by the entireties.

3. The Circuit Court of Appeals erred in finding and holding that Section 202 (*c*) of the Revenue Act of 1916 insofar as it includes tenancies by the entireties is valid.

4. The Circuit Court of Appeals erred in rendering a judgment in favor of the respondent in this Court and against the petitioner.

5. The Circuit Court of Appeals erred in refusing to enter a judgment in favor of the petitioner in this Court and against the respondent.

6. The findings and judgment of the Circuit Court of Appeals in this case are based on a wholly erroneous conception of the law and said court misapplied and misinterpreted the applicable decision of this Court.

## Argument.

The Statutes involved are as follows:

Title II of the Revenue Act of 1916 (39 Stats. 756) provides, so far as pertinent to this case:

> "SEC. 201. That a tax (hereinafter in this Title referred to as the tax), equal to the fol-

lowing percentages of the value of the net estate, to be determined as provided in Section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *

"SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property; real or personal, tangible or intangible, wherever situated:

"(*c*) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. * * *

"SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(*a*) In the case of a resident by deducting from the value of the gross estate.

"(1) Such amounts for funeral expenses, * * * and

"(2) An exemption of $50,000."

The above provisions, with minor changes which are not material, are continued in the Revenue Acts of 1918, and 1921 as Sections 401, 402, and 403 and in the Revenue Acts of 1924 and 1926 as Sections 301, 302 and 303.

Because of the fact that a tenancy by the entirety or by the entireties is a peculiar estate and exists only in

the case of husband and wife and it is inaccurately described in the law, it has been questioned whether Congress ever intended to include tenancies by the entireties in the above provisions. See *Blount vs. United States,* 59 Ct. Cl., 328. In the Revenue Acts of 1924 and 1926 the language of the provision was changed so as to read—"or as tenants by the entirety by the decedent and spouse."

The Commissioner of Internal Revenue has always claimed that the original provision contemplated the taxing of estates by the entireties and both the District Court and Circuit Court of Appeals for the Fourth Circuit in this case concurred in said holding. In this brief it is assumed that such was the intention of Congress.

**Summary of Argument.**

POINTS A-C. By the common law, a surviving tenant by the entireties takes by virtue of the original grant or devise, and does not take a new or additional interest by virtue of survivorship, nor does he take by descent or distribution. Therefore there is no transmission or transfer of any interest in property upon the death of a tenant by the entireties. Such is the settled rule of law in Maryland, and it is binding upon the federal courts in determining the effect of the succession to the interest of a deceased tenant by the entireties in that State.

POINTS D and E. Inasmuch as there is no transfer of any interest in property by the death of a deceased tenant by the entireties, the provision of the Internal

Revenue Act of 1916 is unconstitutional, which levies a tax upon the estate of a deceased tenant by the entireties based upon the interest held by himself and cotenant, because such a tax would be a direct tax. Moreover, inasmuch as said provision measures the tax by the value of the interest of the survivor as well as the interest of the decedent, the tax is capricious and arbitrary and amounts to confiscation in violation of the due process clause of the 5th Amendment of the Constitution.

POINTS F and G. The decision of the Circuit Court of Appeals in this case holding that such a tax is an indirect tax and within the power of Congress is contrary to decisions of this Court and other federal and state courts.

POINT A.

**Under the common law there is no transfer of title or interest in property upon the death of a tenant by the entireties.**

The decision of the Circuit Court of Appeals in this case is based upon the theory that because the tenants by the entireties were two separate individuals, there was in fact and in law a transfer upon the death of one of the tenants to the survivor because

> "Whatever form of technical expression be used the fact remains that, upon the death of one of the parties the survivor by operation of law succeeds to the interest which the decedent had in the property" (Record 38).

On the contrary, it is an established principle of the common law, which has been recognized by this court, that in fact and in law there is no transfer of title or of interest upon the death of a tenant by the entireties to the surviving tenant.

> "The survivor takes by virtue of the original grant or devise; he does not take a new or additional interest by virtue of survivorship, nor does he take by descent or intestate distribution."
>
> 30 C. J. 571;
> *Hunt vs. Blackburn*, 128 U. S., 464, 469;
> *U. S. vs. Robinson*, 183 Fed. Rep., 711;
> *Hupfel's Sons vs. Getty*, 299 Fed. Rep., 939;
> *Biehl vs. Martin*, 236 Pa., 519;
> *Palmer vs. Mansfield* (Mass.), 110 N. E. 283;
> *Matter of Klatzl*, 221, N. Y., 83.

There are no decisions of this court to the contrary effect, and as shown elsewhere in this brief (Point D), the test of the power of Congress is whether there was the power of transmission or transfer from the dead to the living of an interest in property; because it is that privilege or right which the State may change at any time and, therefore, may tax. Where there is no privilege there is no transfer and where there is no transfer there can be no tax. As stated by this court in the opinion in the case of *Nichols vs. Coolidge*, 274 U. S., 531, 541.

> "Congress may lay an excise upon the transfer of property reckoned upon the value of the

interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

POINT B.

**It is a settled rule of property in the State of Maryland that there is no transfer of any interest in property by the death of a tenant by the entireties.**

In the case of *Marbury vs. Cole*, 49 Md. 402, 411, it was held that:

> "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants nor are they tenants in common. They are in the contemplation of the common law, but one person and hence they take not by moities but by the entireties. They are each seized of the entirety and the survivor takes the whole. As stated by Blackstone, 'husband and wife being considered as one person in law, they cannot take the estate by moities but both are seized of the entireties, *per tout, etnon per my;* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor. 2 *Blac. Comm.* 182. This has been the doctrine of the common law from an early period of its history for we find the principle as stated by Black-

stone laid down in *Littleton's Tenures, Section* 291, from whence it has been almost literally transcribed by all subsequent writers on estates. See *Co. Litt.* 187; 2 *Cruise Dig.*, 492; 1 *Prest. Est.*, 131-2; 4 *Kent's Comm.*, 362; 1 *Wshb. R. Prop.* (4th *Ed.*), 672, and the authorities there cited."

See also

*Brewer vs. Bowersox*, 92 Md., 567;
*McCubbin vs. Stanford*, 85 Md., 378;
*Baker vs. Baker*, 123 Md., 32;
*Ades vs. Caplin*, 132 Md., 66.

In Maryland there may be a tenancy by the entireties in personal property as well as real property. *Brewer vs. Bowersox, supra; Baker vs. Baker, supra.*

Under the decisions of the Courts of Maryland neither tenant can mortgage nor convey any interest in an estate by the entireties without the consent of the other tenant. *McCubbin vs. Stanford, supra.*

The property would not pass to a tenant's trustee in bankruptcy.

*Frey vs. McGaw*, 127 Md., 23;
*Ades vs. Caplin, supra.*

In the case of *Ades vs. Caplin, supra,* the court (at page 69) stated:

"The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife, without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all

prejudice, such estate to any greater extent than if it vested in the wife exclusively in her own right. He has no such estate as he can dispose to the prejudice of the wife's estate. The unity of the husband and wife as one person, and ownership of the estate by that person, prevents the disposition of it otherwise than jointly."

A judgment against one tenant does not affect the property.

*Jordan vs. Reynolds*, 105 Md., 288.

POINT C.

**Inasmuch as the nature and incidents of an estate by the entireties constitute a rule of property under the law of Maryland, such rule is binding upon the Federal courts in determining the effect of the succession to the interest of a deceased tenant by the entireties in Maryland.**

Congress cannot declare that there is a transfer from a deceased tenant to the surviving tenant by the entireties in Maryland where the State law says there is none, without modifying the State law to that effect. Congress cannot create a transfer merely for the purpose of imposing a tax thereon where under the law governing the transaction, there is no transfer.

In the case of *Edward Hines, Yellow Pine Trustee, vs. Martin, et al.*, 268 U. S. 458, at page 464, Mr. Justice Stone, speaking for this Court, stated:

"To avoid the uncertainty and injustice which result from the 'discordant elements of a substantial right which is protected in one set of courts and denied in the court with no superior to decide which is right' (Brine *vs.* Insurance Co., 96 U. S. 627) this Court has not hesitated when there has been a conflict of decisions between it and the State Court effecting a rule of property within the State, to overrule its own decisions and to follow the State decisions, once it has become evident that they have established a 'rule of property' as a settled law of the State."

See also

*Clarke vs. Clarke*, 178 U. S., 186;
*Warburton vs. White*, 176 U. S., 484;
*U. S. vs. Title Insurance & Trust Co.*, 265 U. S., 486.

POINT D.

**In so far as Section 202 (c) of the Revenue Act of 1916 attempts to tax the interest of a tenant by the entireties it is a direct tax upon the property itself, and in violation of Act I, Sections 2 and 9, of the Constitution.**

One of the absolute rights inherent in every citizen is that of property; it consists in the free use, enjoyment and disposal of all of his acquisitions without any control or diminution save only by the laws of the land.

1 *Blackstone Commentaries*, 138;
*Buchanan vs. Worley*, 245 U. S. 60, 74.

A tax upon any essential element of ownership is a tax upon the ownership of property and therefore a tax upon the property itself because property is in reality nothing more or less than those elements which the law has always recognized as attaching to the owner of a thing.

Thus, in *Brown vs. Maryland*, 12 Wheat., 419, it was held that a tax on the sale of an article imported only for sale is a tax on the article itself.

See also

*Welton vs. Missouri*, 91 U. S., 275;
*Cooke vs. Pennsylvania*, 97 U. S., 566;
*Nicol vs. Ames.*, 173 U. S., 509.

In *Pollock vs. Farm Loan & Trust Company*, 157 U. S., 429, it was held that a tax upon income derived from rents or profits or income of real or personal property was a tax upon the property itself.

Taxes upon property are direct taxes and must be uniform and be apportioned among the several States according to their respective numbers.

The difference between a transfer of property *inter vivos* and the succession of the property of a decedent under the testamentary or intestary laws is fundamental. When a person dies he ceases to exist in law under the theory of the common law and a "thing" which during his lifetime was his "property" upon his death loses its characteristics as property because there is no one in whom his rights of property inhere. The State, therefore, designates by statute some per-

son in whom the right of property shall vest and the rights of persons to succeed to the property rights of a decedent are statutory. Such a transfer is not an inherent property right but is granted to whomever the State may choose to designate and it is therefore a right or privilege subject to the superior rights of the State.

It therefore logically follows that while a transfer of property between living persons cannot be taxed without taxing one of the rights which comprise the general ownership of property, which would be a tax upon the property itself, on the other hand a tax upon the transfer of or succession to the property of a decedent is a tax upon the privilege or right created by statute, which the State may change at any time.

A tax upon the transfer or transmission of property upon the death of a person has been held to be a tax upon such privilege or right of transfer, and such a tax is held to be an indirect tax within the meaning of the Constitution of the United States.

*Plummer vs. Coler*, 178 U. S., 115;
*Murdock vs. Ward*, 178 U. S., 139;
*Knowlton vs. Moore*, 178 U. S., 41.

In the case of *Knowlton vs. Moore, supra*, in which the late Chief Justice White delivered the opinion of the court, it was shown that in this and other countries, so-called death duties, estate taxes, legacy taxes and inheritance taxes, all "rest in their essence upon the principle that death is the generating force from which the particular taxing power takes its being, and

that it is the power to transmit, or the transmission from the dead to the living on which such taxes are more immediately rested."

With the above principles of law in mind it is perfectly clear that insofar as Sections 201-203 of the Revenue Act of 1916 attempts to tax the estate of a decedent upon the value of any property which he held as a tenant by the entireties it is a direct tax, and in violation of the Constitution of the United States because as shown elsewhere in this brief (Points A and B), the decedent never had more than a life interest in the property unless he survived his cotenant. His interest was one to which the privilege or right of disposition at his death never attached. It was only the right or privilege of transmitting the interest of the decedent's property upon his death which Congress had the power to tax, and inasmuch as he lacked any such privilege or right with respect to his interest in an estate by the entireties, there is nothing to which the tax can attach. The rights of a tenant by the entireties are only such as would obtain if the State had never granted any right or privilege of transmitting the property upon the death of a person.

## Point E.

**The tax is an arbitrary tax and in violation of the Fifth Amendment of the Constitution.**

Section 202 (*c*) of the Revenue Act of 1916 levies a tax upon the estate of one tenant by the entireties measured by the value of the entire property held by

both tenants by the entireties "except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

It will be noted that the provision taxes as a transfer upon the death of a tenant by the entireties and as a part of his estate, *not* his interest which terminated at his death and which of course was not transferred, but the tax is levied upon the entire property. In other words, the statute levies the same tax that would have been levied if he had been the sole owner of the entire property during his life with the right to dispose of same at his death. It taxes the adverse interests in the property of the cotenant. Yet the fact is that from the creation of the estate, the surviving tenant became entitled to the same interest in the property as the decedent during his lifetime and also to the right of survivorship upon his death. Surely it is inescapable that by this statute the estate of the deceased tenant is taxed upon the property of the surviving tenant and it is, therefore, an arbitrary tax. The tax is so arbitrary and capricious as to amount to confiscation and is in violation of the Fifth Amendment of the Constitution. See *Brushaker vs. U. P. R. Co.*, 240 U. S., 1, 24; *Barclay & Co. vs. Edwards*, 267 U. S. 442, 450. In the case of a decedent owning no property whatever at the time of his death except his interest in an estate by the entireties, if his estate is taxable upon the value of that property no tax could be collected without recourse to the property belonging exclusively to the surviving tenant.

## Point F.

**The decision in this case is inconsistent with the decision of this Court in the case of Chase National Bank vs. United States, 278 U. S., 327, and is irreconcilable with the decision of this Court in the case of Reinecke vs. Northern Trust Company, 278 U. S., 339.**

The holding of the court below is to the effect that there was a transfer upon the death of the decedent of all his interest in an estate by the entireties to the surviving tenant, by operation of law, is apparently bottomed upon the court's interpretation of the decision of this court in the case of *Chase National Bank vs. United States,* whereas a proper understanding of the decision of this court in the *Chase National Bank case* lends no support whatever to the decision of the court below in this case.

In the *Chase National Bank case* the decedent had the power to change at any time prior to his death the name of the beneficiary under certain insurance policies upon his life, and this Court held that the interest in the policies retained by the decedent was so great that the transfer to the beneficiaries was not completed until the death of the decedent when the power of control was terminated, and that the power of control or the power to direct the further enjoyment or possession of property after death may be considered tantamount to its exercise and therefore constitutes a taxable transfer. The devolution of the property after the death of the tenant was in accordance with his will because

he could have made a different disposition of it at his death. In that sense the decedent transmitted the property upon his death.

The element of power to control the disposition of the property after death, which was the privilege or right held to be taxable in the *Chase National Bank case*, is entirely lacking in the case of the death of a tenant by the entireties. In the latter case there is no power to change or revoke the right of survivorship, which existed in the cotenant from the very inception of the estate. In the case of a tenancy by the entireties the deceased tenant did not during his lifetime have any power to sell, mortgage, or dispose of any part of the property. He could not in any way prejudice the interest of his cotenant and he was without any power whatever to change in any way the right of survivorship which existed in the cotenant. Is it to be believed that if the decedent in the *Chase National Bank case* had been so circumstanced with reference to the insurance policies which were the subject of that suit that the court would have held that there was a taxable transfer to his estate?

See *Lewellyn vs. Frick*, 298 Fed. Rep., 803.

The construction adopted by the court below in this case of the language of this court in the *Chase National Bank case* is utterly irreconcilable with the decision of this court rendered on the same day in the case of *Reinecke* vs. *Northern Trust Company*, 278 U. S., 339. In that case the decedent during his lifetime had created seven separate trusts. In two of the trusts he reserved the income to himself for his life and after his death

the income was to be paid to certain other beneficiaries until the termination of the trust when the estate went to remaindermen. In each of these two trusts the decedent had reserved the power to revoke, alter or modify the trusts. In each of the five remaining trusts the decedent had also reserved a power to alter, change or modify the trusts, but said power could not be exercised without the consent of the single beneficiary in four cases and the consent of the majority of the beneficiaries in the fifth case. The decedent died without exercising any of the powers reserved under any of the trusts, and the question before the court was whether or not transfers had taken place which were the subject of the federal estate tax law. This court held that in the case of the two trusts in which the decedent had reserved the exclusive power of revocation a transfer had been effected at the time of his death, because until that time the gift had not been complete and the decedent had the right and privilege by revocation to change the disposition of the trusts upon his death. In the case of the five remaining trusts, however, in which the decedent did not have the exclusive power of revocation it was held that no transfer took place at the time of his death and the court, speaking by Mr. Justice Stone, gave the following as the reason:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial and consequently adverse interest, the trust for all practicable purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute" (pg. 125).

It was the lack of exclusive control by the decedent of the disposition of the property after his death which moved this court to hold that there was no transfer upon which the tax could be predicated in the case of the five trusts in the *Reinecke case*. It is manifest that if there had not been such exclusive control of the future disposition of the property covered by the insurance policies in the *Chase National Bank case*, decided on the same day, the court would have held in the *Chase National Bank case* that there was no taxable transfer. Neither case therefore supports the decision of the court below in this case, because in both cases before this court the taxable interest was the exclusive power in the decedent to direct the devolution of title, whereas in the case of a tenancy by the entireties neither tenant has at any time the power to revoke or defeat the other tenant's interest in the property, and the death of one tenant does not give to the surviving tenant anything more than what that tenant had under the original grant. Death simply destroys the interest of the deceased tenant. In this case deceased tenant's interest was not transferred at his death, but merely ceased at his death and that is all that he ever had unless he survided his contenant. Therefore there was no interest transferred at his death which can be properly included in the value of his estate.

## Point G.

**The question involved in this case has been decided by several tribunals inferior to this Court and always contrary to the decision of the court below in this case.**

Thus, the U. S. Board of Tax Appeals has decided that the value of property held by a decedent as a tenant by the entireties should not be included as a part of the gross estate of the decedent for Federal estate tax purposes in the following cases:

> *Appeal of Dyer*, 5 B. T. A., 711;
> *Appeal of Murphy*, 5 B. T. A., 952;
> *Appeal of Provident Trust Co.*, 5 B. T. A., 1004;
> *Appeal of Girard Trust Co.*, 10 B. T. A., 1100 (now pending on appeal before the U. S. Circuit Court of Appeals for the Third Circuit).

The case of *Provident Trust Co.*, referred to above, was subsequently taken to the U. S. District Court for the Eastern District of Pennsylvania, which court reached the same conclusion as the Board of Tax Appeals, and the case is now pending before the U. S. Circuit Court of Appeals for the Third Circuit.

The U. S. District Court for the Middle District of Pennsylvania has reached the same conclusion in the case of *Dime Trust & Safe Deposit Co., Executor, vs. Phillips*, 30 Fed. (2d), 395.

The U. S. Court of Claims reached the same conclusion in the case of *Blount vs. United States*, 59 Ct. Cl., 328. The United States Circuit Court of Appeals for the 9th Circuit likewise came to the same conclu-

sion with reference to the estate of joint tenancy in California in the case of *Carter vs. English*, 15 Fed. (2d), 6. In both these cases, however, the estates were created prior to the Revenue Act of 1916 and it was also held that said act was not retroactive.

**Conclusion.**

It is therefore respectfully submitted, that in so far as the Revenue Act of 1916, Section 202 (*c*), intends to include for Federal estate tax purposes in the gross estate of the decedent, property held by decedent and his wife by the entireties, it is beyond the Constitutional powers of Congress; and, therefore, this case is one calling for the exercise by this Court of its supervisory powers, and to that end a writ of certiorari should issue and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

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